Minutes of the
Criminal Sentencing Commission
And the
Criminal Sentencing Advisory Committee
October 19, 2006

SENTENCING COMMISSION MEMBERS PRESENT
Common Pleas Court Judge Reggie Routson, Vice Chairman
Common Pleas Court Judge Jhan Corzine
Juvenile Court Judge Robert DeLamatre
Defense Attorney Bill Gallagher
Victim Representative Staci Kitchen
Bob Lane, representing State Public Defender David Bodiker
Prosecuting Attorney Steve McIntosh
Nathan Minerd, representing Director of Youth Services Tom Stickrath
Common Pleas Judge Andrew Nastoff
Steve VanDine, representing Rehabilitation and Correction
Director Terry Collins
Public Defender Yeura Venters
Prosecuting Attorney David Warren
Sheriff Dave Westrick
Juvenile Court Judge Stephanie Wyler

ADVISORY COMMITTEE MEMBERS PRESENT
Cynthia Mausser, Chair, Ohio Parole Board
Candy Peters, representing OCJS Director Karhlton Moore

STAFF PRESENT
Scott Anderson, Staff Attorney
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Jocelyn Andras, legislative aide to Senator Steve Austria
Sarah Andrews, Department of Rehabilitation and Correction
Dave Berenson, Department of Rehabilitation and Correction
Jarrod Bottomley, legislative aide to Sen. Timothy Grendell
Jamie Doskocil, Fiscal, Legislative Service Commission
Dan Fitzpatrick, Dept. of Public Safety
James Guy, Attorney, Department of Rehabilitation and Correction
Christina Madriguera, Ohio Judicial Conference
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Scott Neely, Department of Rehabilitation and Correction
Phil Nunes, Ohio Justice Alliance for Community Corrections
Becki Park, Senate Republican Caucus
Erin Rosen, Ohio Attorney General's Office

Jason Walker, Legislative Service Commission

Common Pleas Court Judge Reggie Routson, Vice Chairmen, called the October 19, 2006, meeting of the Ohio Criminal Sentencing Commission to order at 9:43 a.m.

Judge Routson and Dir. Diroll welcomed Common Pleas Court Judge Jhan Corzine as the newest Commission member, who was appointed just prior to the last Commission meeting. He fills the vacancy created by the retirement of Common Pleas Judge Burt Griffin.

DIRECTOR'S REPORT

Director David Diroll reported that the Sentencing Commission's Interim Report on Rape Penalties was forwarded to members of the General Assembly. The Commission will next deal with lingering rape issues, then turn to penalties for other sexual assaults: sexual battery; unlawful sexual conduct with a minor; gross sexual imposition; and sexual imposition.

Victim Representative Staci Kitchen asked for clarification on why most rapes would be made subject to indeterminate sentences and how that change would actually work. The offender, Dir. Diroll explained, would have to serve the minimum term imposed. Unlike pre-S.B. 2, no administrative reductions, such as "good time", could be applied to the minimum. After serving the minimum period, the offender could get an automatic review with the Parole Board or petition the court for a judicial release hearing. The court could deny an inmate's request for judicial release without holding a hearing. If the court chose to consider the request for release, it would conduct an open hearing, which would include the defense counsel, prosecutor and victim.

RAPE: PRESUMPTION AND FINDINGS FOR JUDICIAL RELEASE

Judge Routson asked if the judge must make a finding before release.

Because there is a presumption in favor of prison and against judicial release for first and second degree felons, Dir. Diroll acknowledged that the judge would need to make a finding if he or she decides to offer release for the offender.

Judge Routson remarked that, as a result of *Foster*, clarification would be needed in the judicial release statute.

Dir. Diroll admitted that the Commission should clarify how the presumption toward imprisonment and against release for high level felons in the current judicial release statute (§2929.20) would apply to judicial release *after* an indeterminate minimum is served.

Public Defender Yeura Venters queried why there could be a presumption against release when the person has already completed the minimum.

Common Pleas Court Judge Andrew Nastoff remarked that, according to some case law, when the judge is making that determination in a judicial release setting as opposed to doing so at the front end, then the judge can factor in the time the offender has been incarcerated, as well as the rehabilitative effects of any programs he has completed.

The same analytical framework applies in the case of indeterminate sentences, but there is different input into the analysis. Because the minimum portion of the initial sentence has been served, it cannot be said that judicial release would, for instance, diminish the seriousness of the crime.

If the Parole Board can grant an offender early release, without having to make a finding, asked Judge Nastoff, then why can't the judge make the same decision without a finding? It should not be more difficult for the judge to grant release than it is for the Board, he contended.

Under the Commission's proposal, said Dir. Diroll, there are two parallel release mechanisms available. After serving the minimum sentence for rape, the offender could petition the court to consider a judicial release, or the Parole Board would use the normal process for determining release under an indeterminate sentence. Since there is currently a presumption in favor of prison on flat time sentences, he asked if that presumption or the sentencing factors used as guidance enter into the Board's release decisions.

Currently, under the Parole Board guidelines, the standards for similar S.B. 2 offenses are also taken into consideration, said Board Chair Cynthia Mausser. The factors used by the court are also starting to be taken into consideration by the Board.

Defender Venters argued that the presumption in favor of prison shouldn't be kept once the offender has served the term for the crime.

Judge Nastoff asked about the rationale behind the presumption when it was first established. He wondered if the intent was to counterbalance the shorter determinate sentences.

According to Dir. Diroll, the sentencing presumption carried over to the judicial release decision to give the judge a second thought as to whether a first or second degree felon should be released.

It is essential to keep in mind, said Judge Corzine, that a subsequent judge will be making the judicial release decision in many cases, given the length of minimum sentences for rape. So some guidance or factors to consider would be helpful.

Most judges are hesitant to tinker with a previous judge's decision, said Judge Nastoff.

Atty. Venters explained that the availability of screening tools for assessment while in prison was one reason for including a mid-term opportunity for evaluation.

Dir. Diroll again asked if there should be guidance on judicial release and, if so, what that guidance should be.

Atty. John Murphy, Executive Director of the Ohio Prosecuting Attorneys' Association recommended staying away from presumptions but acknowledged that some guidance would be helpful.

If a presumption were included, then the option of appeal must also be included, said Judge Corzine. On the other hand, if guidance were offered, an appeal option is not necessary.

Ideally, said Judge Nastoff, factors used to determine eligibility for release should be evidence based.

Candace Peters, representing the Office of Criminal Justice Services, suggested tying these factors to the predictive factors of recidivism, which include: prior sexual offense conviction, sexual deviancy (exhibitionism, voyeurism, cross-dressing), antisocial orientation, unstable lifestyles (impulsivity, lack of employment, substance abuse, intoxicated drinking, tendency toward hostility), history of rule violations, noncompliance with supervision for violations of conditions, sexual attitude (attitude toward tolerance of sexual crime), emotional identification with children, conflicts with intimate partner or lack of an intimate partner, and sexual preoccupations.

Some of those would be difficult to prove, especially after years in prison, said Judge Corzine.

Judge Routson agreed that the factors would be hard to codify.

Judge Nastoff suggested using the same factors considered at a sexual predator hearing.

Judge Corzine suggested using those factors, plus an assessment and an institutional report.

The Commission needs to work on the sexually violent predator language at some point, said Dir. Diroll. In the meantime, he summarized the consensus to remove the presumption and to mandate that the offender serves his minimum sentence. When up for review, there would have to be an assessment which the court would consider along with other institutional reports.

According to Ms. Peters, if an assessment says the offender is likely to recommit, the judge is not likely to release them.

Atty. Venters declared that the assessment is still subjective. Some people may continue to maintain their innocence which an assessment scores poorly as denial.

Judge Nastoff argued that there are various evaluation tools used that already take a lot of factors into consideration.

Representing Department of Rehabilitation and Correction, David Berenson remarked that the assessment tool (Static 99), by itself, can be weak in determining a child molester’s risk level to recommit. That is why DRC uses a combination of assessment tools to predict recidivism. He noted that incompetence, strong anti-social orientation, and sexual deviancy are the factors that raise immediate red flags. That information, he pointed out, is research driven.

Judge Corzine remarked that he orders a pre-sentence investigation (PSI) and a psychological evaluation on all sex offenders.

There are new instruments for evaluating the risk of sex offenders, said Mr. Berenson. He noted that when these offenders recidivate, it is usually for other types of crime, not sex offenses.

A consensus was reached that the neutral review conducted after the minimum sentence was served would include an assessment and personal institutional record, as well as other records of past conduct.

Judge Routson noted that the overriding factors of sentencing would still have to be taken into consideration as well.

Ms. Kitchen asked whether the court would consider that the offender pled to a lesser charge. She feels that a plea to a lesser charge should be regarded as a risk factor, particularly if it has happened multiple times. She contended that, some offenders, if allowed to continually plead down, tend to escalate their offenses.

The key, said Judge Corzine, is getting accurate information. He noted that a PSI does not tell the judge if the prior offense was pled down. It is necessary for the judge to take caution in how to factor in information on priors without having a court of appeals overturn it.

Parole Board Chair Mausser noted that, when making release decisions, the Board takes into account the offender's behavior as well as evaluations/assessments and the impact on the victim. It also considers how the victim continues to be affected.

Noting that those factors relate to the seriousness of the offense, Judge Routson pointed out that the victim would have to be willing to present testimony at the hearing.

Because the victim has had time to heal from the physical and emotional distress of the crime, the opportunity to provide testimony at a Parole Board hearing often brings forth greater detail about the crime's impact than at the time of sentencing, said Chair Mausser. It also helps that the victim is not being cross-examined at this hearing.

Dir. Diroll pointed out that a judicial release hearing is not a re-sentencing.

Judge Nastoff declared that the judge should not be prevented from looking at the original sentencing factors. He feels it should all be part of what the judge is allowed to consider.

The indeterminate sentence provides a chance to evaluate what has been learned since the original sentencing, to see if the offender deserves a chance for release, said Atty. Gallagher.

Atty. Venters echoed the need to recognize institutional adjustment by the offender during his time of incarceration. However, he fears that the Commission is moving too far away from truth-in-sentencing.

What is on the table now, Judge Nastoff clarified, is that there would *not* be a presumption that the judge would have to overcome, yet some guidance would be available.

Atty. Murphy does not feel the proposal has departed from truth-in-sentencing. If the court imposes a sentence of 5 to 25 years, the offender will serve at least the minimum 5 years. Before S.B. 2, he would have served less than the 5 years. The maximum portion is where there might be some question, but a remedy is available.

Director Diroll summarized the consensus reached by the Commission:

> **At a judicial release hearing for a rapist who has served the minimum sentence imposed, the court should not be guided by a presumption in favor of keeping the inmate in prison. Rather, the court should consider the nature and circumstances of the offense, assess the offender's likelihood toward recidivism, and assess the offender's efforts toward rehabilitation, and receive testimony from the victim(s).**

According to Judge Routson, the Rules of Evidence would not apply in these proceedings.

RAPE: COMMISSION STRATEGY

Noting that the Commission's efforts to re-examine sexual offender registration and notice (SORN) law and sex offense law rose out of a concern over rushed legislation in the wake of pressure to get tougher on sex offenders, Atty. Gallagher recommended sending a new letter to the General Assembly, stating that time and deliberation are needed to develop good law, not speed. He does not want the pressure of S.B. 260 to cause us to present piecemeal recommendations.

Sex offender bills will continue to be considered even after this session, said DRC Research Director Steve VanDine.

Judge Corzine commended the Commission's efforts to ameliorate the effects of S.B. 260.

If a cost analysis were attached to our recommendations, said Atty. Venters, it would improve their chance of being reconsidered by the General Assembly. He would like to see more information on the fiscal impact of the recommendations.

Christina Madriguera of the Ohio Judicial Conference reported that the Conference has received feedback from judges related to concerns over the Commission's rape proposals and the impact of S.B. 260.

The version tested, said Mr. VanDine, came from the beginning of the previous meeting. The total impact over 20-30 years, he reported, would be a need for 940 extra beds, or 470 beds within 7 years of passage. This would require the construction of one new prison. The Commission's proposal would have less impact on the prison population than S.B. 260, even if S.B. 260 only applies to younger offenders.

Even the OPAA recognizes, said Atty. Murphy, that the Sentencing Commission's proposal is more workable than S.B. 260.

It would have been nice to have looked at all sex offenses together, instead of piecemeal, said Atty. Gallagher.

RAPE: APPLYING THE REPEAT VIOLENT OFFENDER SPEC

Director Diroll noted that the specific application of the repeat violent offender (RVO) classification was not addressed when the Commission discussed rape penalties. He asked what the penalty should be when an offender is convicted of rape and an RVO specification.

The RVO classification is currently used for murder and aggravated murder, which carry indeterminate terms, said Mr. VanDine.

For rape with an RVO spec, Atty. Gallagher suggested that the offender could get 10 years with an additional 10 years.

Atty. Murphy suggested that the RVO enhancement probably should be written as an indeterminate sentence that adds up to 10 years to the minimum and maximum sentences for the underlying offense.

Judge Corzine instead suggested adding additional flat time to the minimum sentence.

Judges Nastoff and Corzine then suggested that it could be set up like the gun spec where the offender would serves the RVO spec first, then the time for the underlying offense.

Another option, said Atty. Murphy, would be to allow the judge to choose a minimum number for the indeterminate sentence, then a specific number of years (from 1 to 10) to tack on as an additional RVO penalty. The offender would serve the RVO time first, then the indefinite period would be served for the underlying offense.

By acclamation, the Commission agreed to recommend:

> **If a repeat violent offender (RVO) specification is found in a rape case, the number of RVO years in prison imposed by the judge would be served first, then the offender would serve the penalty for the underlying rape.**

RAPE: MERGING SEXUAL PREDATOR LAW

Dir. Diroll next asked if the penalties from the sexual predator statutes should be integrated into the sex offender sections, starting with rape.

It would only confuse things if these were put together, said Atty. Murphy. He recommended keeping them separate.

Atty. Gallagher agreed that it would be easier if they were kept separate.

CHANGES TO FEDERAL SORN LAW

It may also be necessary to think about this issue when the Commission returns to SORN Law, said Dir. Diroll.

Ms. Peters reported that new federal SORN law creates three levels/tiers for SORN law, with Tier III being the worst. Efforts are being made by a task force—which includes representatives from OCJS and

the Attorney General's Office—to determine what changes must be made in Ohio law to achieve compliance with the new federal law. Some of the differences, she noted, are that federal law does not include proof of sexual motivation for a child victim offender or a hearing process. The tiers are set up by an offense-based designation.

Erin Rosen, representing the Attorney General's Office, remarked that gross sexual imposition is the most complicated section to decipher under the new federal law, particularly regarding how it differs from the Ohio statute. She also noted that federal law now recognizes possession of child pornography as a Tier II offense, where Ohio law does not recognize it as a SORN offense at all.

Ms. Peters explained that a minimum sentence of 12 months is needed to place an offender in tier I (the lowest level), which requires SORN registration for 15 years. The minimum number of years required for sex offender registration in Ohio is 10 years.

It is unclear whether the SORN registration data will follow the offender from state to state, said Atty. Rosen. However, each state must participate in the nationwide database. Also unclear is whether hearings are necessary to reclassify sex offenders currently incarcerated to determine their tiers under the federal legislation. Juvenile offenders over the age of 14 who are adjudicated for certain offenses, such as rape, will be included in the national database.

Dir. Diroll acknowledged that it would probably be best to wait and see how these differences play out.

Ms. Peters noted that there is no "sexually violent predator" classification under the new federal law. Rather, a sexually violent predator would be recognized as a Tier III offender.

The state definitions and levels can be kept, said Atty. Rosen, but they must be applied to the new federal tiers. She noted that, under the federal legislation, Tier III will mean nothing to the public, unlike Ohio's current SVP label. She pointed out that the federal legislation also does not require registration for offenses involving consensual sexual activity among teens.

According to Ms. Peters, the names of currently incarcerated sex offenders have to be entered into the federal registry right away as opposed to waiting until the offender's release from incarceration.

SPOUSAL EXEMPTIONS

Current law does not consider sexual conduct with a person under age 13 to be rape if the victim is the spouse of the offender, noted Dir. Diroll. This is peculiar, he claimed, because there are unlikely to be "spouses" who are under 13. The statue also has a spousal exception for the impairment prohibitions (using a drug to impair resistance or taking advantage of a person impaired by age or mental condition).

Some teens go to Kentucky, said Juvenile Court Judge Stephanie Wyler, where they can marry at the age of 16 without parental consent.

If the charge is forcible rape of a victim over 13, said Dir. Diroll, it is not a defense that the offender and victim were married. On the other hand, the spousal exemption is allowed for impaired rapes.

Ms. Kitchen argued that the spousal exemption should be removed.

Judge Nastoff questioned whether there was any scenario where the spousal exemption should be retained.

The provision was probably put in as opposed to something else being taken out, said Ms. Peters.

The inconsistency extends further, said Dir. Diroll, because raping one's spouse is illegal in other respects, except this one, where the spouse is under the age of 13.

Judge Corzine expressed reluctance to removing the spousal exemption because of numerous domestic relations issues that are extremely difficult to prove. He noted that someone could easily claim rape in a case of consensual sex between a married couple where one has schizophrenia or bipolar disorder.

There are abuses of every crime, said Judge Nastoff. It is unfair to declare that a spousal exemption is not a legitimate defense just because there is potential for abuse in some areas, he added.

The question, said Atty. Gallagher, is whether the action rises to the level of a crime.

Judge Corzine believes the exemption serves a purpose and should remain.

No consensus was reached on the provision.

SEXUAL BATTERY UNDER H.B. 95

There is also a peculiarity regarding H.B. 95, said Dir. Diroll. The sexual battery statute (§2907.03) deals with "sexual conduct" (penetration) with a non-spouse under certain exploitive circumstances (coercion, impairment, and mistake, or in relationships such as parental, custodial, school, clergy, etc.). The penalty is an F-3. However, if the victim is under 13 the penalty is a mandatory prison term from the F-2 range, under H.B. 95. The problem, said Dir. Diroll, is that the bill takes conduct covered by the rape statute—which has F-1+ penalties—and makes it an F-2. In short, Dir. Diroll asked, does the sexual battery penalty trump the penalty for statutory rape?

Separately, he noted, the "position of trust" and types of impairment language differ in the various sexual assault statutes, making them confusing.

H.B. 95 creates a serious problem, declared Judge Corzine, because if there are two sets of penalties on the books that cover the same act or offense, then he feels the court is obligated to sentence under the lesser of the two penalties.

When asked for further clarification, Dir. Diroll noted that before H.B. 95 there was no conflict because there was no specific offense of sexual battery under 13. The conflict is created because both sections say that sexual *conduct* with someone under the age of 13 is a crime, but one statute lists the act as rape and the other lists it as sexual battery. The easiest solution, he noted, would be to strike the provisions that were added by H.B. 95, while explaining the change to the General Assembly.

A parent could have sex with a child under 13 and declare it is sexual battery, not rape, said Judge Corzine. He feels the "under 13" part should be eliminated so that any sex with a child under 13 is rape.

By acclamation, the Commission agreed:

> **To recommend removing the "under age 13" penalty enhancement from the sexual battery statute (§2907.03(B)) so that it does not conflict with the more serious penalties for the same conduct under the rape statute.**

Discussion turned to other aspects of the sexual battery statute. If the penalty enhancement is removed, said Judge Wyler, then it is necessary to define a minor as someone between the age of 13 and 18 so that they cannot be charged.

The Commission discussed adding language to §2907.03(C) stating that a minor is someone over the age of 13 but not yet 18.

Atty. Rosen pointed out that §2907.03(A)(1) through (4) apply mostly to adults.

Ms. Peters asked how a prosecutor decides to charge sexual battery instead of rape.

Atty. Rosen responded that it sometimes depends on the relationship between the perpetrator and the victim.

Many sexual battery cases, Judge Nastoff claimed, involve victims who intoxicated themselves voluntarily.

Judge Corzine feels that legislators will accept the Commission's recommendation since it is suggesting that "sexual battery" against someone under the age of 13 should be recognized as an F-1 offense instead of an F-3.

If sexual *conduct* is committed with a victim under 13, then it is rape, Judge Wyler declared.

Judge Corzine clarified that if sexual battery were an F-2 across the board, it would carry a presumption in favor of prison but not a mandatory sentence.

Since most are offenses being pled down to sexual battery, Atty. Gallagher suggested giving discretion to the judge for determining where to place this.

There was some sentiment favoring placing sexual battery the F-2 level when the offender abuses a position of trust.

Judge Routson asked how legislators are likely to react.

If sexual battery is pulled out as an offense for victims under the age of 13 and charged as rape instead, while sexual battery against someone over the age of 13 carries an F-3 penalty, Dir. Diroll remarked that the legislators may be inclined to lean toward something in the middle. Conversely, if sexual battery against someone under age 13 is pulled out and sexual battery is made an F-2 offense across the board or for "position of trust" violations, legislators might then leave it alone.

Ms. Peters wondered why the penalties for sex offenses didn't step down as the severity of the crime steps down.

Pros. Dave Warren urged the need to give the prosecutor credit for having common sense. He declared that, if a person has a position of authority over the victim and they commit a sex offense against that victim, they should serve time in prison for that offense.

Judge Corzine reiterated that, for anything placed at the F-2 level, there would be a presumption toward incarceration, but it is not mandatory.

Ultimately, consensus was reached to recommend:

No further changes in the sexual battery statute at present.

A recommendation to increase sexual battery across the board to an F-2 offense was defeated. The recommendation to develop hybrid sentences for sexual battery, making some F-3 offenses and others F-2 offenses was also defeated in a close vote.

Generally, Judges Wyler, Corzine, and Nastoff, and Attys. Lane, Gallagher, and McIntosh favored leaving the remaining penalties alone, while Judge DeLamatre, Sheriff Westrick, Mr. VanDine for DRC, Pros. Warren, and Ms. Kitchen preferred separating it into two classes.

UNLAWFUL SEXUAL CONDUCT WITH A MINOR

Unlawful sexual conduct with a minor refers to penetration of a non-spouse victim, who is 13, 14, or 15 years old, by an adult when the offender knows or is reckless in regard to the victim's age. The current penalty is F-4, said Dir. Diroll. If the offender is less than 4 years older than the victim, however, the penalty is M-1. The penalty is F-3 if the offender is at least 10 years older. The penalty is F-2 if the offender has been convicted of a prior rape, sexual battery, or unlawful sexual conduct with minor. H.B. 95 changed none of this.

Mr. Diroll explained that this "sexual conduct" statute acknowledges the relative ages of the putative defendant and victim and effectively removes most juvenile offenders who have consensual intercourse. He wondered if a similar distinction should be made in other sexual assault statutes. Additionally, he wondered whether the F-2 level for all subsequent offenses is too broad, since prior violations can include misdemeanors.

Judge Nastoff recommended increasing the penalty for unlawful sexual conduct with a minor to an F-2 when the offender is older than the victim by 10 years or more.

If it is a consensual situation and the age differential is the only issue, said Atty. Gallagher, then it is quite different from a case with the same age difference but the offender is in a position of authority over the victim.

Tentative consensus was reached that an F-2 penalty should be applied for sexual battery §2907.03(A)(5)-(12) when the offender is older than the victim by 10 years or more.

Judge Wyler suggested developing a color coded chart to make it easier to see how these offenses and penalties fall into place.

FUTURE MEETING DATES

Future Sentencing Commission meetings were tentatively set for November 16, January 18, February 15, and March 15.

The meeting adjourned at 1:48 p.m.